United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

ORIGINAL

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

v.

JOHN CAPRA, et al.
Defendant-Appellant

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1037

UNITED STATES OF AMERICA

V.

JOHN CAPRA, et al.
DEFENDANT-APPELLANT

ON APPEAL FROM THE JUDGMENT OF CONVICTION FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (73 Cr. 460).

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellants, Leoluca Guarino and Steven Dellacava, respectfully petition this Court for a rehearing and respectfully suggest that a rehearing be held en banc.

The defendants, Guarino and Dellacava, hereby join in the points raised by the petition submitted by the defendant, Capra, regarding remand of this case for a taint hearing. The defendant, Capra, has joined in the points raised in this petition.

I

THE DEFENDANTS, CAPRA, GUARINO AND DELLACAVA RESPECTFULLY SUBMIT THAT THE ISSUE OF PUBLICITY AT THE TIME OF THE ARREST OF THESE DEFENDANTS AS A SUITABLE ISSUE FOR CONSIDERATION BY THIS COURT EN BANC [1]

The panel opinion has chosen to exercise the supervisory power of the Court of Appeals in connection with the publicity at the time of the arrest only to the extent of admonishing the Government that a recurrence of the type of publicity which occurred in this case must not be permitted. A similar warning was made in a panel decision to the Government in United States v. Pfingst, 477 F. 2d 177 (2nd Cir., 1973). There, as was done here, the Trial Court took the Government to task for its conduct in holding a press conference to announce the indictment of the defendant. The panel in Pfingst was of the opinion that the "form of the public announcement of the bribery indictment ... raises ... troublesome questions." Id. at 185. Significantly, Pfingst was decided on April 4, 1973. The events which occurred in this case occurred between April 13 and April 16, 1973. Accordingly, the Government, in the face of this Court's admonition in Pfingst not only continued that form of public announcement which raised troublesome questions but went one step further by publicizing in a dramatic way the pre-arrest briefings, arrest raids, arrests and arraignments of these defendants.[2]

1. The panel's decision regarding publicity at the time of the arrests is contained at pp. 5002-5005 of the Slip op. dated July 26, 1974.
2. The Trial Court found that the actions by law enforcement officers resulted "in massive and lurid publicity." Memorandum on Pre-Trial Publicity dated January 8, 1974, Appendix, Vol. 1, p. 163.

I

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Nevertheless, the Government only reluctantly conceded that the action it had taken was in contravention of Justice Department guidelines - guidelines which the prosecution itself had made. Moreover, this Court recognized that the Government's belated conclusion after oral argument that the press should not be invited to meetings of law enforcement officers was not sufficient.

The activities of the Government not only violate due process [3] but as this Court noted, present "the grave danger that undue publicity will, in advance of trial, convict the accused in the minds of the general public." (Slip op. at 5005). As was pointed out in the briefs for appellants on appeal, these activities of continued leaks, trial by press and search of atmosphere continue unabated. [4]

Surely, the admonition of the panel in Pfingst went unheeded. Only the fullest exercise of this Court's supervisory power in a case which the Government believes to be an important one can likely assure that a recurrence of publicity designed to convict the accused in the minds of the general public will not be before this Court for review. Accordingly, in the face of the Government's belated and insufficient admonitions of error, and the continuation of activities which have been condemned, the indictment should be suppressed.

3. See cases cited by the Trial Court in its opinion, Appendix Vol. 1 at p. 167. See also United States v. Nixon, decided July 24, 1974 by the United States Supreme Court, 15 Cr. L. 3329 at 3333 where the Court stated
> "so long as this regulation remains in force, the Executive branch is bound by it, and indeed, the United States as the sovereign, composed of the three branches is bound to respect and to enforce it."

4. See point 1 of appellant, Capra, brief on appeal in which the defendants Guarino and Dellacava joined.

II

COUNTS 2, 3, 4 and 5 SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL FOR THE TAINTED EVIDENCE OF THE CONSPIRACY PREJUDICED THE JURY'S VERDICT OF GUILTY ON THOSE COUNTS AS TO CAPRA; GUARINO AND DELLACAVA

The evidence presented by the Government as to counts 2, 3, 4 and 5 rely only on the testimony of Ramos and Simms which testimony was uncorroborated as to the defendants Capra, Guarino and Dellacava. That evidence as the Government described it in its brief, was as follows. As to count 2, the Government contended at page 8 of its brief

> "as they left the motel room, Jermain told Ramos that the money for the kilogram of heroin was in the trunk and that he would take care of the delivery of the narcotics."

The Government's evidence as to count 2 finally was that Jermain gave Harris and Simms two packages containing the kilogram of heroin. Nowhere in the testimony is there direct knowledge of Ramos that Jermain received the heroin from Capra, Guarino or Dellacava. As to count 3, the Government cited in its brief at page 10 the trial transcript, pages 281-286 which transcript reveals the testimony of Ramos as follows:

> "Q. Several days later, did Bobby Jermain come to your house?
>
> A. Yes, he did.
>
> Q. What took place at that time?
>
> A. He told me, "We have to go to the airport," he says, "I gotta call and they'll be coming in by plane."

I asked him where were the goods at. He told me the trunk of the car.

Q. Did you go to the airport?

A. Yes, we left my house and then we went to the airport.

Q. Mr. Ramos, tell the Court and jury what took place at the airport when you arrived?

A. Well, we were waiting by the gift shop, Bobby and myself. Bobby had an attache case, and then Morris and another guy came. We didn't know who the other guy was at the time.

Q. What was in the attache case that Bobby Jermain had?

A. We had the two kilos of heroin.

Q. What took place?

A. So Bobby waited by the gift shop and I waited maybe about -- I stood away from him about five yards, and then Morris and this other guy came and, this other guy with the suitcase came over by the gift shop, put his suitcase down, Bobby, put his down, and then the other guy picked up Bobby's suitcase and Bobby picked up the suitcase with the money. I looked at Morris, he looked at me, then he turned around, he turned around, and left.

Again, the testimony of Ramos leaves a void in the evidence as to where and from whom Jermain received the heroin. With regard to counts 4 and 5 (the Toledo counts), the Government contended at page 14 of its brief that "Ramos was informed by Jermain at Diane's Bar that the suitcase had been delivered by a courier to Toledo." Significantly, Ramos claimed again that he never saw the heroin and was only informed of its passage by Jermain. No direct connection in Ramos' testimony is established to Capra, Guarino and Dellacava.

The Government's presentation, therefore, of conversations from the Diane's Bar wiretap occurring some two months after the alleged Toledo shipment strongly and overwhelmingly corroborated Ramos' testimony that Capra, Guarino and Dellacava were engaged in the narcotics business. [5] For this Court to suppress narcotic conversations of defendants and affirm substantive counts in which the jury overheard the voices of the defendants engage in narcotics conversations, is to ask a jury to engage in such mental gymnastics as could not be accomplished by the greatest of men - including judges. Bruton v. United States, 391 U.S. 123 (1968); see also dissent of Mr. Justice Frankfurter in United States v. Delli Paoli, 352 U.S. 232, 246 (1957).

There was, of necessity, a substantial risk that the jury looked to the incriminating extra judicial statements contained in the wiretap in determining the defendants guilt on the substantive counts. Moreover, the

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5. The evidence clearly showed that (a) no one knew of Capra, Guarino or Dellacava until the commencement of the illegal wiretaps and (b) no one knew of Ramos' connection with Capra, Guarino and Dellacava until after October 2, 1972 when the conversation was intercepted at the Havermeyer Club pursuant to a bug which was authorized as a result of the illegal wiretaps at Diane's Bar. See also Exhibit 3562 in which George Eaton testified before the Grand Jury as follows:

Q. "Drawing your attention to another electronic eavesdropping intercept, did you have occasion to listen to a tape of an intercept involving a conversation among Dellacava, Capra and Guarino concerning a trial that took place in Toledo, Ohio?

A. Yes ...

Q. Incidentally, you have learned, haveyou not, through your fellow officers, that John Ramos was convicted in Ohio approximately the last week of September, 1972?

A. That's correct ...",

testimony which was admitted concerning the defendant, Guarino's, arrest on February 3, 1972 along with Dellacava, flowed directly from the wiretap declared by this Court to be illegal and was strongly corroborative of an illicit relationship between Dellacava and Guarino.

Bruton reversed a conviction even though the jury had been instructed in that case to disregard a co-defendant's confession. In the trial below, not only was the jury permitted to consider illegal evidence on the issue of conspiracy but was instructed that this evidence could be used in their determination of guilt or innocence in regard to the substantive counts. Jackson v. Denno, 378 U.S. 368 (1964) is significant in this regard since Jackson was directly concerned with obviating a risk that a jury might rely on unconstitutionally obtained evidence in determining the defendant's guilt.

Absent, the unconstitutionally obtained evidence from the Diane's Bar wiretap, the Government's case against Capra, Guarino and Dellacava relies entirely upon when the co-defendant, Jermain, told Ramos. The defendant's link to any conspiracy or common scheme, although contained in Ramos' testimony, is totally uncorroborated except for the wiretap evidence and its fruits. Ramos' testimony, therefore, propped and aided by the evidence of the wiretaps, without doubt, convinced the jury of the defendant's guilt on the substantive counts. This Court in United States v. Bozza, 365 F. 2d 206 (2nd Cir. 1966), considered the prejudicial overspill effect on defendants and said

> "Although in a sense the confession in both cases 'merely corroborated what the Government already had established,' 352 U.S. at 242, 77 S. Ct. at 300, the similarity is more formal than real. Whereas the admission in Delli Paoli was hardly critical to a case already made out by testimony of outside observers, Jones' confession furnished devastating corroboration of the heavily attacked testimony of an accomplice on which the prosecution almost entirely depended for proof of guilty. This admission by a defendant that Kuhle had worked with him and all the others probably ended whatever chance any of them might have had to find a juror unconvinced of his guilt beyond a reasonable doubt. Indeed, even if the jury could perform the feat of not speculating over the inserted blanks, Jones' confession of his own association with Kuhle would have a serious spillover effect at least on Mulhearn and Pizzo." Id. at 216.

Accordingly, "at a minimum", this case should be remanded to the Trial Court for a hearing in connection with the issue of taint and/or a new trial should be granted on the substantive counts 2, 3, 4 and 5.

Dated: New York, New York
August 8, 1974

Respectfully submitted,

GEORGE L. SANTANGELO for
Leoluca Guarino

LAWRENCE STERN for
Steven Dellacava

ATTORNEYS' CERTIFICATE

GEORGE L. SANTANGELO and LAWRENCE STERN, attorneys for defendant-appellant, LEOLUCA GUARINO and defendant-appellant, STEVEN DELLACAVA, do hereby certify that the within petition is presented in good faith and not for reasons of delay.

GEORGE L. SANTANGELO, Attorney
for Leoluca Guarino

LAWRENCE STERN, Attorney
for Steven Dellacava

M & V. Capria

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9th day of Aug., 1974 deponent served the within Petition upon M.L. Attorney

attorney(s) for Capriccio

in this action, at M.L. Courthouse
Foley Sq
N.Y.C.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
9th day of Aug. 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976